Supreme Court of the United States.

OCTOBER TERM,

No. 88

THE BRUNSWICK TERMINAL COMPANY,
A CORPORATION, ET AL.,

APPELLANTS,

versus

THE NATIONAL BANK OF BALTIMORE,

APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR APPELLANTS.

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THE BRUNSWICK TERMINAL COMPANY AND OTHERS.
vs.
THE NATIONAL BANK OF BALTIMORE.
No. 88.

IN THE
Supreme Court
OF THE
United States.

This case comes up from the United States Circuit Court of Appeals for the Fourth Circuit, upon the certificate from such Court, asking the construction and advice of this Court upon certain questions certified.

STATEMENT OF FACTS.

The Bill of Complaint in this cause was filed in the Circuit Court of the United States for the District of Maryland on January 14, 1898, by the Brunswick Terminal Company and others, creditors of the Brunswick State Bank, a corporation chartered by the State of Georgia, which failed and was declared insolvent in May, 1893.

The object of the bill is to enforce in behalf of the creditors of said Brunswick State Bank against the National Bank of Baltimore, an alleged stockholder, a statutory liability equal to the par value of the stock in the Brunswick State Bank at one time standing in the name of said National Bank of Baltimore.

The case was first heard on a demurrer to that part of the defendant's answer which set up the plea of limita-

tions under the Maryland Statute. The Circuit Court overruled the demurrer, and on the appellant's appeal to the Circuit Court of Appeals for the Fourth Circuit that decision was reversed, and it was held that the Georgia Statute, by which suits to enforce rights accruing under acts of incorporation may be brought within twenty years, was applicable, and that the Maryland Statute was not to be applied.

Brunswick Terminal Co., et al, vs. The National Bank of Baltimore, 99 Fed. Rep., 635.

The defendant thereupon moved the Supreme Court of the United States to issue the writ of certiorari, which motion was duly denied.

National Bank of Baltimore vs. Brunswick Terminal Co., 178 U. S., 611.

The case was then heard on the merits by the Circuit Court upon bill, answer and an agreed statement of facts, and on December 18, 1901, after full argument, said Court (Morris, D. J.,) filed its opinion in favor of the defendant, and on December 20, 1901, signed a decree dismissing the bill with costs.

An appeal was then taken by the plaintiffs to the Circuit Court of Appeals for the Fourth Circuit, which said Court, upon hearing said appeal, certified the case to this Court, the facts of the case being fully set out in the said certificate of the Circuit Court of Appeals.

ASSIGNMENT OF ERRORS.

In the appeal to said Circuit Court of Appeals the appellants assigned the following errors:

1. That the United States Circuit Court erred in dismissing Bill of Complaint of the appellant.

2. That the said Court erred in rendering a decree against appellants in said case upon the proceedings and agreed statement of fact.

ARGUMENT.

The first question certified by the Circuit Court of Appeals is:

I. "Is this question of the liability of a stockholder of this bank (Brunswick State Bank) one of general law, or must we follow without question the decision of the Supreme Court of Georgia?"

The decision of the Supreme Court of Geergia referred to is that of Chatham Bank vs. Brobston, 99 Ga., 801, the head notes to which said decision, in so far as they bear upon this case, are fully set forth in the certificate of the Court of Appeals on page 4. The Court of Appeals also refers to certain decisions of the said Supreme Court of Georgia leading up to this final decision, which said decisions we will set forth as fully as appears necessary for the purposes of this case.

Lane vs. Morris, 8 Ga., 468.

This was a suit at law by a creditor of the Planters' and Mechanics' Bank of Columbus against one Morris, a stockholder in said bank, upon his liability as a stockholder under the charter thereof. Such charter provided, (see page 474,) "the persons and property of the stockholders shall be pledged and held bound in proportion to the amount of shares, and the value thereof, that each individual or company may hold in said bank, for the ultimate redemption of the bills and notes issued by said bank, in the same manner as in any action of debt, and no stockholder shall be relieved from such liability by sale of his stock until he shall have caused or have given sixty days' notice in some public gazette in this State."

The Court says, (Justice Lumpkin) page 474: "All then, whoever were stockholders, are liable to bill and note holders, unless they have been discharged in the manner prescribed by the Act as such is the plain, spoken and unmistakable language of the statute; and so ample was the security which the Legislature intended to provide, that even sale and notice is no protection, if within six months of the failure."

On page 475 the Court holds that in this particular case the notice published by the stockholder, Morris, was sufficient, and, therefore, that he was exempt from liability imposed. But the general doctrine is established in this case, that a stockholder of a bank remains a stockholder thereof as regards creditors, no matter whether such debts may have been incurred, before or after he may have transferred his stock upon the books of the corporation, unless he shall likewise have complied with the statutory requirement that such transfer should be advertised.

This, to be sure, was a case of a note holder, but the Court, evidently, disregards entirely the question as to when the note may have been issued and decides the case upon the general doctrine above cited.

Thornton vs. Lane, 11 Ga., 459.

This was a suit by the same Lane as in Lane vs. Morris, against another stockholder of the said Planters' & Mechanics Bank of Columbus, upon his statutory liability, as above set forth.

The Court, (Justice Lumpkin) in his opinion, pages 489 and 490, comments upon the elaborate character of the arguments in this case, and also upon the fact that a number of the points argued had been decided in the case of Lane vs. Morris, supra. and states that the reargument was only permitted on the ground that the previous hearing had not been before the full Court, and goes on to say: "We need not say, however, that when questions have been once decided by this Court, they are to be considered the law of the land, and respected and carried into full effect as such, the same as a statute of a State."

On page 505, the Court refers to the arguments of the Appellant that the only stockholders liable for the Bank's debts, (in this case its notes) were "those who were stockholders when the bills were issued, and who, notwithstanding the transfer of their stock, had failed to get re-

leased on the conditions prescribed by the Act," and while admitting that this rule in business corporations may be just and right, gives good and sufficient reasons why it is not the proper construction of the statute, summing up their entire opinion as follows, (page 506:) "But candor compels us to say that in our judgment, the fallacy of the proposition consists in the assumption that the same meaning is to be attached to the term stockholder, wherever it occurs in the Act. The true distinction is this, the unlocking of which, has created much confusion in this argument. The same individuals may be stockholders outside, but not inside, the corporations. As regards *third persons*, and the liability clause in the 11th section, all are stockholders pro hac vice, who were such and who have failed to get released in the manner prescribed by the charter." The entire principle contended for is contained in this statement; once a stockholder, always a stockholder, unless the transfer is advertised, as required by law.

Force vs. Dahlognea Co., 22 Ga., 86.

This also was a suit by a creditor of a corporation (here a manufacturing company) against a stockholder thereof, upon his statutory liability. The statutory liability in this case was defined by the Act of 1838, being the very Act applicable to the case at bar. The lower Court denied the liability of the defendant upon the ground that he had heretofore transferred his stock, but the Supreme Court reversed this judgment as follows, (page 91:) "And an issue was tendered by the plaintiff and refused by the Court, to establish the fact that he was not only one of the original stockholders, but continued to be such up to the time when the debt was contracted and suit instituted.

That Mr. Mason was one of the original stockholders is not denied. The Act of incorporation recites the fact that the charter was granted to him and others therein named. He made no attempt to say that he had ever

transferred his stock by the terms of the Act of 1838, to regulate the settlements between banking institutions of this State and to define the liability of stockholders who shall transfer their interest therein, or other institutions.

The second section of that Act declares that "whenever a stockholder in any bank or other corporation, etc.," (reciting in full section 1496 of the Code of Georgia.)

Under this act it would seem, the defendant is liable as a stockholder, unless he alleges and proves that he has discharged himself according to the provisions of this statnte."

This case decides the exact point in issue and with reference to ordinary debts of a manufacturing company.

Mason vs. Force, 30 Ga., 99.

This was the same case as the above in another form.

The Court (Mr. Justice Lyon) says, page 100: "Were the plaintiffs in error stockholders in the Dahlognea Company, are (and) liable as such for the debts of the Company?" This question was made in a case between the same parties in 22 Ga., 86, in which this Court held they were not only stockholders originally, for this fact appears in the charter, but they were liable as such for the debts, unless they could allege and prove that they had been discharged from such liability according to the provisions of the second section of the Act of December 29th, 1838, Cobb 112—that is, by a transfer of their stock and a publication thereof in two newspapers, or in the nearest place where the corporation kept its principal office, once a month for six months immediately after such transfer. The appellants did offer proof of the transfer of their stock in the Company, but they did not show or attempt to do so, that they had published notice of such transfer in the terms of the Act. The second section of the Act of incorporation of this company makes 'the private property of the stockholders bound for the payment of the debts of the Company.' The question

is *settled* that the appellants, as stockholders, are liable for the debts of the company."

The italics are ours.

Brobston & Co. vs. Downing.

Brobston & Co. vs. Chatham Bank, 95 Ga., 505.

These were suits by certain creditors of the Brunswick State Bank, being the same Bank involved in the case at bar, against certain stockholders thereof upon their statutory liability, as in this case.

The appellees in the action demurred upon several grounds, among others (being the 8th ground given), that the declaration did not allege at what time the debts of the several appellants were incurred.

The case is decided on the head notes by the Court (Chief Justice Beckey). The first head note (referring to this question) is as follows: "With or without a clause in the charter restricting the personal statutory liability of stockholders to the amount of stock at its par value at the time the debt in question was created, the liability exists and continues for any debt incurred by the corporation *at any time*, until the stockholder who claims to be exempt by reason of having sold and transferred his stock before the debt w s created, has given notice of such sale conformably with section 1496 of the Code." Justice Lumpkin concurring dubitante. The italics are ours, but it is respectfully submitted that it is evident that the whole point of this decision and the whole point of the doubt expressed by Justice Lumpkin was in the words italicized: "at any time."

The demurrer was on the ground that the declaration did not give the dates when the debts were incurred, and, of course, it followed from this that the debts might have been incurred before the appellees became stockholders at all, and it is respectfully submitted that this was really the only question before the Court, and the only question upon which Justice Lumpkin had any

doubt, for the reason that there never had been and was not in this case any dispute as to the fact, that a stockholder once a stockholder continued a stockholder as to creditors, until he transferred his stock in the manner provided by the statute; the only question before the Court, was whether or not this doctrine applied to debts incurred *before* the defendant became a stockholder. This is made especially plain by the next case.

Chatham Bank vs. Brobston, 99 Ga., 801.

This case is a review of the cases above cited. The head note is set forth (in so far as it bears in this case) in the certificate of the Circuit Court of Appeals.

The Court, says, page 803:

"In the cases of Brobston & Co., et al. vs. Downing, and same vs. Chatham Bank, 95 Ga., 505, this Court in effect decided that a stockholder in this bank was in fact liable for his pro-rata part of the debts of the corporation created *before* he became a stockholder, as well as for a like proportion of the indebtedness incurred by it while he held his stock. This decision controls the present case. Upon a review of it, duly allowed, Chief Justice Simmons and Justice Lumpkin are of the opinion that it should be affirmed; and Judge Gover, on this point of it, of necessity concurs in the judgment now rendered. He is, nevertheless, of the opinion that in dealing with the cases reported in 95 Ga., supra., the Court in so far as it held that a stockholder of this bank could be made liable for any debt created by it *before* he actually became a stockholder, misconstrued that portion of the bank's charter which is quoted above. If free to do so, he would hold that under the language just referred to, the individual liability of a stockholder of this corporation is limited to such debts only as were contracted *during* the time he was an owner of stock and up to the date when, relatively to such liability, he *legally* severed his connection with the corporation. *We all agree* that such owner, although he may have transferred his stock,

would still be bound under the above cited section of the Code, for whatever liability the charter fixed upon him, unless he gave the notice provided for by that section.

In 1894, an Act was passed by the General Assemby which materially modifies the law bearing upon this subject, in that it dispenses with any necessity for a stockholder, upon transferring his stock, to publish notice of the fact in order to discharge him from liability. That Act declares that 'whenever a stockholder in any bank or other corporation is individually liable under the charter and shall transfer his stock, he shall be exempt from such liability by such transfer, unless such bank or other corporation shall fail within six months from the date of such transfer.' Acts of 1894, page 76, Civ. Code, 1888. In view of the radical change thus made in the law, the difference of opinion which exists between the majority and the minority of the Court as constituted for the hearing of the cases now in hand is, apparently, of but little practical importance, save as affecting the result of the present litigation.

If another case should arise the decision of which would depend upon the question as to which we disagree, the whole matter would still be open to review by a bench of six justices. Accordingly, we have agreed among ourselves to let the present decision stand upon the head notes as announced, with the foregoing explanation of our reasons for not entering upon a discussion as to what should be the proper construction of the bank's charter now under consideration."

The italics are ours. The only question therefore in doubt was whether a stockholder was liable for debts created *before* he became a stockholder?

The position of the plaintiffs here has never been questioned by any Judge of the Supreme Court of Georgia.

The question, therefore, before this Court is not whether the Federal Courts are bound by a decision of the Supreme Court of Georgia upon the special right, rendered after the commencement of this litigation, but whether the Federal Courts are bound by the decision of such Court previously rendered and consistent with its previous decisions, interpreting a general law, and thus fixing the liability of stockholders of all corporations incorporated by the State. It is not the construction of the charter of the Brunswick State Bank that is attacked, but the construction by the Court of Section 1496 of the Code. The suit was instituted, contested, and, in regular course, went to the Supreme Court of the State, was determined by such Court, after due consideration, and determined, as far as residents of the State of Georgia are concerned, at least, adversely to the contention of the defendant. And now this Court is urged to reverse such decision with respect to non-resident stockholders, and thus relieve them from the liability imposed by the Statutes of Georgia, as interpreted by the Supreme Court upon residents of the State. The mere statement of the case would seem to refute itself.

Not relying for the moment upon the general doctrine that the Federal Courts will (except in certain well-determined cases hereinafter referred to) follow the decisions of the State Courts interpreting State statutes, every consideration of equity and justice requires that all the stockholders of any one corporation should be governed and controlled by the same law; that the liability of one stockholder should be the liability of all; that the rights of one should be the rights of all.

Stockholders of corporations have mutual rights and liabilities among themselves, and especially is this true with reference to this liability to creditors when a corporation becomes insolvent. To release one stockholder from liability is to increase the liability of the remainder, and thus to destroy that very principle of equality

which is the basis of the law controlling the relations of stockholders to each other and to the corporation. This consideration alone should control this case. It would be contrary to public policy to hold that the Federal Courts and the Courts in each State in the Union are at liberty to determine this question of statutory liability for themselves regardless of the decisions of the Supreme Court of the home State. Such holding in fact would throw the door wide open to fraud and injustice, as the Courts of each State would be only too willing, under such circumstances, to relieve their citizens from the liability imposed upon the resident stockholders, thus imposing upon such resident stockholders an unfair share of the burden of corporate debt.

The defendant (to avoid this doctrine) lays great stress upon the similarity between the charter of the Brunswick State Bank and section 5151 of the Revised Statutes of the United States, June 3rd, 1864, relating to the liability of stockholders in National Banks, but in fact such charter and such statute are as notable for the difference as for the similarity between them. But with all due respect, the appellants can not see that this similarity or dissimilarity, whichever may be more notable, has anything whatever to do with the case. It might well have been that the two statutes, one of Congress and one of the State of Georgia, were identical in terms, being copied verbatim, one from the other, but even in such case it is plain that if such statutes were construed by the Federal Courts with one effect and by the Courts of Georgia with another, that in such case the Federal Courts when construing the Georgia statute, would have to follow the decisions of the Courts of Georgia, while equally the Courts of Georgia when construing the Federal statutes would be compelled to follow the decisions of the Federal Courts. The rule establishing the binding effect of the decisions of the Federal and State Courts interpreting respectively

the Federal and State statutes (like all good rules) works both ways; the rule is applicable to Federal and State Courts alike, and, therefore, it follows that if the Federal Courts are not bound to follow the decisions of a State Court upon a question of statutory liability imposed by the statutes of that State, because in some respects such statutes are similar to the National Banking Act, then it equally follows that the State Courts would not be compelled to follow the decisions of the Federal Courts in the interpretation of the National Banking Act, for the reason that it was similar in some respects to a State statute imposing a like liability.

It is difficult, indeed, to follow the argument of the defendant in this respect.

Again the defendant seems to rely upon section 1888 of the Civil Code of the State of Georgia, (and, indeed, the Circuit Court of Appeals includes this section in its certificate), declaring that: "Whenever a stockholder in any Bank or other corporation is individually liable under the charter and should transfer his stock, he should be exempt from such liability for such transfer, unless such Bank or other corporation shall fail within six months from the date of such transfer"; this being in effect a repeal of section 1496 of the Code of Georgia relied upon by the plaintiffs in this case, but as such Act was passed in 1894 and the liability of the defendant in this case to the plaintiffs became vested prior to that date, it is difficult to see the bearing of this particular statute of the State of Georgia.

It may be suggested that it was enacted because the Supreme Court of the State of Georgia put a construction upon section 1496 not satisfactory to the Legislature, nor just to the stockholders of the various State corporations effected thereby; but this very suggestion itself answers the argument of the defendant, for it contains an admission that under the statute of the State of

Georgia in effect down to 1894, the defendant in this case became liable to the plaintiffs as claimed, and that it was necessary to repeal such statutes in order to prevent subsequent stockholders of other corporations becoming liable under similar circumstances in the future.

As heretofore suggested, there have been, cases where the Federal Courts have refused to follow the decisions of State Courts interpreting their own statutes, but the limitations of the powers of the Federal Courts in this respect are fixed and determined, and such limitations cannot be overridden without great danger to the amity and comity existing between the various Courts of the country.

It has been held by this Court that it will not be bound by the decision of a State Court determining a right under a statute, if that very right is at that time before the Federal Courts for determination.

The case of Burgess vs. Seligman, 107 U. S., 33, goes as far as this Court will probably ever go in this connection. That also was a question of the statutory liability of stockholders, and the question before the Court was the interpretation of a statute of Missouri. After decision in the case by the Circuit Court of the United States, the Supreme Court of Missouri in a case involving the same question, determined it differently, and this determination of the Supreme Court of Missouri was pressed upon the attention of this Court. Mr. Justice Bradley, page 34, says: "We do not consider ourselves bound to follow the decision of the State Court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal Courts have an independent jurisdiction in the administration of State laws, co-ordinate with and not subordinate to that of the State Courts, and are bound to exercise their own judgment

as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State Constitutions and Statutes."

Similarly in Carroll County vs. Smith, 111 U. S., 556, this Court was asked to follow a decision of the Supreme Court of Mississippi determining the same question but pronounced after the controversy arose. The Court, Mr. Justice Mathews, refused so to do relying upon Burgess vs. Seligman, supra.

The doctrine of Burgess vs. Seligman, is also well stated in Sandford vs. Poe, 16 C. C. A., 30[illegible]

But this whole question has been before this Court very lately in the important case of the Security Trust Company vs. Black River National Bank, decided November 1st, 1902, and reported in 187 U. S. page 211. The suit was originally brought in the Circuit Court of the United States for the District of Minnesota, and the defense was that by the statute of Minnesota as construed by the Supreme Court of such State, the claim was barred by the statute of limitations applicable to suits against administrators, and this Court in its opinion sets out fully the decision of the Supreme Court of Minnesota so determining, to-wit: the case of the State ex rel. Meteson vs. Ramsey County Probate Court, 84 Minn., 289; which decision of the Supreme Court of Minnesota, however, was severely criticised in the brief of the appellee in error for reasons much more substantial, it is submitted, than those advanced by the counsel

for the appellee in this case. This Court speaking by Mr. Justice Shiras, on page 226 states such criticism as follows: "Some criticism is made in the brief of the appellee in error of the decision of the Supreme Court of the State of Minnesota in this case; that the issue was feigned and an imposition upon the Supreme Court, and that the purpose of the decision was to forestall the decision of this Court."

Certainly, this suggestion would have been sufficient reason for this Court to have gone behind the decision of the Supreme Court of Minnesota if it considered that it had the legal right to do so. And this Court goes on to say immediately after stating this criticism, that: "If, indeed, the judgment of the Supreme Court in that case were relied upon as adjudging a case which had already passed into judgment in the Circuit Court of the United States, we might readily agree, as urged by the defendant in error, that the decision of the Supreme Court of Minnesota "should receive little, if any, weight, by this Court in the consideration of this case." But that decision is cited and relied on by the plaintiff in error, not as an adjudication of the facts in controversy here, but as an interpretation of the statutes of the State. Cases may be found of decisions made by a State Supreme Court, even in exposition of State statutes, *after* the institution of litigation in a Federal Court, wherein this Court has refused to follow such a decision, if in it the State Court has departed from its previous decisions, which were in force and relied upon by the Federal suitor." Burgess vs. Seligman, 107 U. S., 33, 27 L. ed. 365, 2 Sup. Ct. Rep. 10; Carroll County vs. Smith, 111 U. S., 556, 28 L. ed. 517, 4 Sup. Ct. Rep., 539.

"Here, however, the Supreme Court of Minnesota, in its last opinion, did not depart from or modify its previous decisions on the subject. On the contrary it based its reasoning and conclusions upon its frequent decisions."

"Nor are we permitted on the record in that case to impute to the parties therein an attempt to mislead the Court or to improperly invoke its jurisdiction. The case seems to have gone before the Probate Court, the District Court, and the Supreme Court, in the usual course of procedure, and the decision finally rendered by the Supreme Court must be received by us as a valid exposition of the law."

"The conclusion to which we are brought, by an examination of the statutes of the State of Minnesota and of the decisions of the Courts of that state in construing and applying them, is, that had a suit against an administrator of an estate been brought in the Courts of that State, after the expiration of the period limited by the order of the Probate Court, in which creditors may present claims against the deceased for examination and allowance, and after an allowance of the administrator's final account and a final decree of distribution, such suit could not have been maintained."

It will be noted that as the Court refers to the case of Burgess vs. Seligman and Carroll County vs. Smith, supra., without comment, this opinion may be taken as a re-statement by the Supreme Court of its decisions in such cases. It is respectfully submitted, therefore that such cases cannot be extended beyond the statement as above.

It is to be further noted that this Court by italicizing the word "after" in the above excerpt, limits the decisions not binding upon the Federal Courts, to those made *after* the institution of litigation in a Federal Court.

In the case at bar as in such case, the decisions of the Supreme Court of Georgia relied upon are not mere adjudications of the facts in controversy in this cause, but are interpretations of a general statute of the State of Georgia. The statute interpreted, (the interpretation of which is disputed by the appellee) is not the charter of the Brunswick State Bank, of which this appellee was a

stockholder, but is section 4196 of the Code of Georgia; and such statute of the State of Georgia was applicable not only to the Brunswick State Bank and to the stockholders thereof, including the defendant, but was applicable to every stockholder of every Georgia corporation, and, the Supreme Court of the State of Georgia, like the Supreme Court of Minnesota "in its last opinion did not depart from or modify its previous decisions on the subject. On the contrary it based its reasons and conclusions upon its frequent recent decisions."

As seen in the review of Georgia cases the identical principles involved in this case have been decided in the early history of the Supreme Court of the State in the Columbus Bank cases, in which a provision identical in principle was embodied in each of the charters for the protection of bill holders of the Bank, that all stockholders would remain liable until they had published notice of transfer of the stock, the only difference being as to the length of notice, etc. These cases came before the Supreme Court of Georgia the first time in Lane vs. Morris, 8 Ga., 468, in which the Court decided the identical principle laid down in Brobston vs. Downing, 95 Ga., 505, also in 10 Ga., 162, Lane vs. Morris. In 11 Ga., 459, Thornton vs. Lane, an appeal was made to the Supreme Court to review its rulings in the two cases above recited. Some of the best lawyers of that time in Georgia were engaged on both sides. The Chief Justice of the Court was Judge Lumpkin, conceded to have been one of the ablest jurists Georgia has ever produced, and the identical cases laid down in the Brunswick State Bank cases were reaffirmed, namely, that all stockholders remained stockholders, notwithstanding a transfer of their stock, as to all liability which the section in relation to publication is intended to protect, until such time as they had complied with the law of notice by publication. This same principle is ruled in 16 Ga., 217, Lane

vs. Harris. It was again ruled in the case of Force Bros. & Co. vs. Dahlonega L. & M. Co., 22 Ga., 86, and upon the identical Code section, *1496 of the Code of 1882*, involved in this case, by Judge Lumpkin, who had decided the Columbus Bank cases before referred to. The same case in a different form, in Mason & Field, Jr., vs. Force Bros. & Co., and others, 30 Ga., 99, was decided by Judge Lyon, of the Supreme Court of Georgia, upon the identical principle laid down in Brobston vs. Downing, and Chatham Bank vs. Brobston, above referred to.

Here is an unbroken line of authority from the first decision in 8 Ga., 468, down to these decisions in 95 Ga., and 99 Ga., sustaining the principles contended for, namely, that a stockholder cannot relieve himself from liability by a mere transfer of his stock, or cease to be a stockholder by the mere transfer of his stock, but remains liable, not only to creditors whose claims were created prior to such transfer, but to all creditors of the corporation until he has given the notice required by law of such transfer. This being the settled law of Georgia, we contend that Judge Morris was in error in dismissing this bill, because by an unbroken line of decision of Circuit Courts and Supreme Courts of the United States, such construction by a Court of last resort of a State, of liability created by statute, is binding upon him. And especially is this true since in view of this history of this doctrine as established in Georgia, it is respectfully suggested, that the cases cited by the Circuit Court and the counsel for the appellee have no application to the case at Bar. In the case of the Central Railway & Banking Co. vs. Wright, 164 U. S., 327, the Supreme Court refused to follow the head note of the Georgia case simply and only because the three Judges "each gave a different reason for his opinion," the only opinion that sustained the head note being that of Mr. Justice Warner, with regard to which the Supreme

Court says: "If the opinion of Mr. Justice Warner had been the opinion of the Court, it would have been difficult to avoid a conclusion that this was the construction of the charter which would have been binding upon the Federal Courts, as it held in effect that the law taxing the property of the Railway impaired the obligation of the contract contained in the charter, but his opinion was not the opinion of the Court, but of only one of its three members; the opinion of the Court was simply that the action of the Court below should be reversed for reasons in which no two ot its members concurred." In the Georgia cases above referred to, the Court established the doctrine contended for, and without dissent as to this particular doctrine.

The other cases cited by the Court and counsel below have each one reference to decisions of the State Courts not in any way enforcing a doctrine of law or a previous interpretation or construction of a statute, but merely determining the rights of other parties growing out of the same subject matter and in each one of these cases the Supreme Court expressly states that if similar decisions had been rendered by the State Courts establishing this doctrine of law prior to the accruing of the causes of action in question, that the U. S. Courts would have been bound thereby."

In addition, there are two late cases by this Court; one re-affirming the general doctrine, and one re-stating the exception thereto as established by Burgess vs. Seligman. In Manley vs. Park, decided January 5th, 1903, 187 U. S., 547, Mr. Justice White, speaking for the Court, says: (page 551).

"The first and second propositions, it is manifest, simply invite a consideration of the constitution and laws of the State of Kansas; and consequently the construction adopted by the Supreme Court of Kansas of the pertinent provisions of such constitution and laws is

binding upon this Court as a decision upon a matter of purely local law, not presenting a Federal question."

This was a decision of the Supreme Court of Kansas interpreting a general statute of such State, and this Court, therefore, following precedent, held that it was bound thereby.

As already noted, the decisions of the Supreme Court of Georgia attacked by the defendant, are decisions interpreting not the charter of the Brunswick State Bank, but the statute of the State of Georgia controlling the general liability of stockholders in corporations.

The distinction between general decisions and decisions affecting special rights, has been consistently maintained by this Court in all cases.

The other case referred to was with reference to the interpretation of a stature of the State of North Carolina authorizing the issue of certain bonds, and here (Board of Commissioners Stanley County vs. Coler, decided June 1st, 1903, 190 U. S., 437,) this Court refused to follow the decision of the Supreme Court of the State of North Carolina which decision did not decide any question of general law, but was rendered solely with reference to the specific right in question; quoting with approval the exception to the general doctrine as set forth in Burgess vs. Seligman, as follows: (page 445).

"So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts *after* such rights have accrued." The italics are ours.

It is sufficient, therefore, with reference to this matter, to again note the fact that the doctrine of law contended for was established by the Supreme Court of Georgia in a line of cases prior to and having no relation to the

cause of action in this case; prior, indeed, to the incorporation of the Brunswick State Bank.

The second question certified by the Circuit Court of Appeals is as follows:

2. When shares in other corporations are transferred into the name of a national banking association, is there a presumption, and consequently notice to the world, that such shares are held by such national banking association in some other capacity, and not as owner thereof?

It is really difficult to understand exactly what the Circuit Court of Appeals means by this question. How in the world a holding in the name of a bank is to be notice to all persons that said bank was not the holder of the stock in question cannot be imagined. On the contrary, it is evident that a holding of stock in the name of a person or corporation is a direct statement to all the world that said person is the owner of said stock and that therefore the said bank would be estopped from denying such presumption unless the party claiming thereunder, in some way, had notice that the holding was not as it purported to be. The question was put this way by the Court we assume on account of the language used by this Court in Robinson vs. Southern National Bank, 180 U. S., 309.

In such case this Court, in referring to the wellknown cases of California Bank vs. Kennedy, 167 U. S., 362, and Concord Bank vs. Hawkins, 174 U. S., 364, holding that it was not competent for national banks to invest any portion of their capital permanently in the stock of another corporation, and that they were not estopped from setting up such want of power against suits to enforce liability for assessments made by the Comptroller of the Currency, says:

"While not disposed, as at present advised, to push "the principle of this case so far as to exempt such

"banks from liability as other shareholders, where they "have accepted and hold stock of other corporations as "collateral security for money advanced (a proposition "which we withhold from decision), we think there is "a presumption in such case againt any intention on the "part of the lending bank to become owner of the col- "lateral shares."

"This was the view taken in the case of Baker vs. "Old National Bank, 86 Fed. Rep., 1006, and Frater vs. "Old National Bank, 103 Fed. Rep., 391, where it was "held, after full consideration, that it is only in clear "cases that a pledgee, on the ground of estoppel, can "be subjected to liability for an assessment on national "bank stock instead of the owner, upon whom the legal "obligation rests, and that where stocks stood upon the "books of a bank in the name of a person as cashier etc." The whole point of these cases was that the stock had never been transferred to the name of the Bank.

Likewise in the case of Robinson vs. Southern National Bank, the stocks had never been transferred into the name of the Southern National Bank. The entire question before the Court was whether in spite of such fact, that is to say, in spite of the fact that the Southern National Bank had never been a stockholder of record of the State National Bank of Vermont, the Southern National Bank could be held liable as a stockholder thereof. The facts were that the Southern National Bank, upon default in the payment of its loan, bid in the stock of the State National Bank of Vermont at a nominal price, and, as the Court says, page 306:

"The important inquiry is whether by the mere act "of bidding in the stock at a nominal price the Southern "National Bank of New York must be regarded as having "submitted itself to liability as the real owner thereof", it further appearing from the facts that the said purchase and sale had been subsequently set aside and the stock had never been in fact transferred to the Southern National

Bank. Whereupon the Court says, (318-309:) "It is "admitted that Curtis has always been and is liable, as "the registered owner of the stock; that at no time, nor "in any way, has the Southern National Bank held itself "out to the State National Bank of Vermont, or to its "creditors, as a shareholder therein; and it is admitted "that the Southern National Bank never received divi- "dends and never voted on said stock."

The only question before the Court, therefore, in such case was whether the Southern National Bank was in fact the owner of the stock in question, having taken it as collateral security but never having held the record title, and in the absence of any satisfactory evidence that the said bank had become the legal owner thereof by legal purchase the Court held that there was "a pre- "sumption in such case against any intention on the part "of the lending bank to become an owner of the collat- "eral shares." There is not even any analogy between such case and this.—This Court did not mean to say that in cases of this character, to wit, cases where the bank in question had transferred the stock into its own name, the presumption of ownership would not arise because, as already suggested, such inquiry would seem to be almost foolish, but merely decided that *in the absence of* such transfer of the stock upon the books of the Company, there was a presumption against the intention of the bank to hold such stock as owner. In fact the Court held that the registered holder, Custis, was of necessity liable. The question involved was not that of record but of actual ownership. It is respectfully submitted, therefore, that this second question certified by the Circuit Court of Appeals was founded upon a misunderstanding of the language of this Court as above set forth, and has no application whatever to the case at bar.

The third question certified is as follows:

3. If a national banking association causes shares in other corporations to be transferred to its own name, is it estopped from setting up the invalidity of such a transaction?

It is respectfully submitted that the validity of a transfer of the stock under such circumstances has never been questioned by any Court, and therefore the question of estoppel with reference to the invalidity of such transaction, being a valid transaction, cannot arise. It is perfectly true that this Court in a number of cases affirming decisions of other Federal Courts has held, and such proposition has never been denied, that national banks have no power to permanently invest their funds in the stock of other corporations.

California Nat'l Bk. vs. Kennedy, 167 U. S., 362;
First Nat'l Bk. vs. Hawkins, 174 U. S., 364;
Robinson vs. Southern Nat'l Bk., 180 U. S., 309-10.

But the power of such banks with reference to taking stock in their own name for the better security of loans has been determined by this Court exactly to the contrary and such power distinctly upheld. In Germania National Bank vs. Case, 99 U. S., 628, a case in every way similar to the one above, except that it was a case between two national banks, and therefore, one, in which the contention of the respondent if it had any merit at all, would have had application, the Court, Justice Strong, finally and absolutely determined not only, (which has never been denied), that a National Bank has a right to transfer into its own name stock which it holds as collateral security for a loan, but further that even under the National Banking Act, such absolute transfer without qualification, is such a holding out as would estop such Bank from denying its statutory liability as a stockholder. The Court says: (page 631.)" It is thoroughly established that one to whom stock has been transferred in pledge as

collateral security for money loaned and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors," and this finding is absolutely necessary to the decision in the case. This case has never been either criticised or qualified by any subsequent decision of the Supreme Court of the U. S., or in any wise referred to except as an authority, by any Court, while it has been affirmed in

Anderson vs. Phil. Warehouse Co,, 111 U. S., 482, and

Pauly vs. State Loan Co., 165 U. S., 616,

in which latter case the Court, Mr. Justice Harlan, referring to Anderson vs. Warehouse Co., Supra., says: "This Court in that case recognizes it to be well settled that one who allows himself to appear on the books of a National Bank as an owner of its stock is liable to creditors as a shareholder, whether he be in fact the absolute owner or only a pledgee." * * * "But the Court observed 'it has never to our knowledge been held that a mere pledgee of stocks is chargeable when he is not registered *as owner*."

This entire question is well considered by Mr. Leonard Jones, in his work on "Pledges and Collateral Securities, "2nd Ed. (1901) Chap. 12 beginning at page 463," wherein he lays down the doctrine as follows: "In general it may be said that one to whom a certificate of stock has been issued absolutely, but in fact as collateral security, assumes the liabilities of a stockholder so far as concerns the creditors of the corporation, and must bear all the burdens that relation imposes" and further, page 464, "A pledgee in whom the legal ownership appears to be is subjected to the same liabilities any other stockholder is subject to unless exempted by statute."

So well established is this doctrine that such exemption of pledges from statutory liability must be made by

statute, that a number of the States have enacted such laws, all of which is fully set forth on pages 472 and 477 by Mr. Jones. The absence of Georgia from the list of States therein referred to, is suggestive.

Attention is also called to Sec. 445 A., page 471 of such work, in which Mr. Jones treats of the National Banking Act and the liability of pledgees thereunder.

Ap analysis of the other cases cited below, and it is believed of all the late cases upon this subject decided by the Federal Courts, will show that not only has the right of a National Bank to transfer for its own protection, into its own name, stock in other corporations held by it as collateral security, never been questioned, but more than this; all such cases recognize that if such transfer is made absolutely and without condition or qualification, then and in such case National Banks are liable to creditors on account thereof.

In Pauly vs. State Loan Co., 165 U. S., pages 606-9, the stock in question was transferred to the State Loan & Trust Co., of Los Angeles as "pledgee," and the Court, therefore, held that as the National Banking Act was only intended to impose a liability upon the actual owner of the stock, that this transfer as pledgee was not sufficient to create an estoppel, but the Court, Mr. Justice Harlan, after analizing the previous decisions deduced from them the following rule (among others) page 619.

"That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of U. S. Rev. Stat. Sec. 5151, and, therefore, liable upon the basis prescribed

by that section for the contracts, debts and engagements of the association."

California National Bank vs. Kennedy, 167 U. S., 364, was a case of the attempted investment by a National Bank of its funds in the stock of a saving's institution, and the Court, Mr. Justice White, asserts the recognized rule that National Banks have no such power to make such investments, that the transfer upon the books is *ultra vires* and that a National Bank has the right "to assert the nullity of an act which is ultra vires."

The case of First National Bank of Concord vs. Hawkins, 174 U. S., 374, was a case also of the attempted investment by one National Bank of its funds in the stock of another, and this Court simply follows California National Bank vs. Kennedy, supra.

Scott vs. Deweese, 181 U. S., 202-17-18, was a case of the irregular issue of the stock of a National Bank, and the Court, Mr. Justice Harland, distinguishes such case from National Bank vs. Hawkins, supra., reiterating the doctrine of the above case with reference to the investment by a National Bank of its funds in the shares of another National Bank, as above set forth, and closing the opinion in these words: "Whether a national bank may not be deemed a shareholder, within the meaning of section 5151, if it holds shares of another bank as security for previous indebtedness, is a question suggested in former cases, but not decided, and upon which, in this case, no opinion need be expressed."

It is respectfully suggested that the Court in this dicta overlooked the case of Germania National Bank vs. Case, supra. But, however, this may be, this statement refers merely to the right of one National Bank to become the holder of the stock of another *National Bank* under section 5201 of the National Banking Act, which section provides that no National Bank shall make a loan or

discount on the security of its own stock. This Court was in such opinion discussing the effect of the decision in National Bank vs. Hawkins, supra., wherein it was held that: "this provision forbidding a National Bank to own and hold shares of its own capital stock would, in effect, be defeated if one National Bank were permitted to own and hold a controlling interest in the capital stock of another." The Court, Mr. Justice Harlan, therefore, in the closing remarks above quoted, evidently had no reference to any case except that of one National Bank holding the stock of another *National* Banking Association.

The cases of Baker, receiver, vs. Old National Bank, 86 Fed. Rep. 1006, and Hubbell vs. Houghton, 86 Fed. Rep., 527, were both cases in which the transfer of the stock upon the books of the corporation was not absolute, in which cases under the National Bankng Act, there couldnot possibly be any liability.

It is respectfully submitted, therefore, that the doctrine established in Germania National Bank vs. Case, supra., and affirmed in Anderson vs. Phila. Warehouse Co., supra, and again affirmed in Pauly vs. State Loan Co., supra., is the law on this subject, and that if a National Bank, or any individual allows himself to appear on the books of any corporation as an owner of its stock, then it is subject to the liability to creditors imposed by the statute creating the corporation upon the record holders of the stock.

It should be noted here that there is a sharp distinction in this respect between the National Banking Act and the laws of Georgia with reference to statutory liability.

As shown above, the intention of the National Banking Act is to hold the *owner* of National Bank stock primarily liable to its creditors regardless of the *record*

ownership of the stock, and, indeed, the record holder of such stock, if not the owner, can only be held so liable upon the principle of estoppel; whereas, as determined by the Supreme Court of Georgia in the cases above cited ("and evidently from the wording of the law properly so determined") this liability is primarily imposed by the Georgia statute upon the *record* holder of the stock regardless of *ownership*.

And with reference to the particular point under discussion, that is to say; the liability of the record holder of the stock, when in fact such stock is held as collateral security, the Court in Chattam Bank vs. Brobston, 99 Ga., 801, says: "Where the charter of a bank imposes upon all its stockholders personal liability to its creditors, such liability attaches as well to those who acquire a complete legal title to stock of that bank by having same transferred to them as collateral security for debts due by the transferors, as to those who purchase such stock outright."

The holders of record of the stock of Georgia corporations, therefore, regardless of the legal ownership or the purpose for which such stock is held by them, are liable directly to the creditors of the corporation by virtue simply of such record holding, and, there is no analogy between the case of such stockholders and the stockholders of record in National Banks who can only be held liable as owners through the principle of estoppel. In the case at bar, the question of estoppel does not even arise, for the reason that the statute imposes such liability directly upon the defendant as a stockholder of record.

It is suggested, in conclusion, that this entire case should be controlled by the decision of the Circuit Court of Appeals upon the first appeal, 99 Fed. Rep., 635. Such Court then held that the liability of the defendant

was controlled, even as to limitations, by the decisions and statutes of Georgia; certainly then, such decisions and such statutes must control the question whether or not the defendant was, as a stockholder of record in a Georgia bank, liable to the creditors at all.

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